122-629

Supreme Court of the United States of America.

No. ~~1237~~ 505

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JOSEPH DAVIES,
as Collector of Chicot County, Arkansas,
Plaintiff in Error,

vs.

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS and CHAS. R. BISSELL,
Defendants in Error.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

RECORD.

Filed March 22. 1884.

LITTLE ROCK:
UNION PRINTING COMPANY, LAW PRINTERS.
1884.

In the Supreme Court of the United States

OF AMERICA.

JOSEPH DAVIES, as Collector of Chicot County, Arkansas, *Plaintiff in Error*,

No.— v.

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS, and CHARLES R. BISSELL, *Defendants in Error.*

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

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UNITED STATES OF AMERICA—SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Circuit Court of the United States, for the Eastern District of Arkansas—Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, and wherein Austin Corbin, J. K. O. Sherwood, E. H. Shirk, C. E. Lewis, F. B. Loomis and Charles R. Bissell are relators, and Joseph Davies, as Collector of Chicot County, Arkansas, is respondent, and wherein by the consideration of said Court the said respondent was required to proceed to collect certain taxes levied on the taxable property within the County of Chicot, in the State of Arkansas, to satisfy the relators' judgments, against said county a manifest error hath happened, to the great damage of the said Joseph Davies, as Collector of Chicot County, Arkansas, respondent, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States ought to be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this, seventh day of March, in the year of our Lord one thousand, eight hundred and eighty-four, and of the inependence of the United States the one hundred and eighth.

[SEAL.]

RALPH L. GOODRICH,

Clerk of the Circuit Court of the United States of America, for the Eastern District of Arkansas.

Allowed by HENRY C. CALDWELL,

United States District Judge.

The execution of the foregoing writ of error appears from the schedule hereto attached.

RALPH L. GOODRICH, CLERK.

CITATION.

THE UNITED STATES OF AMERICA—GREETING:

To Austin Corbin, J. K. O. Sherwood, E. H. Shirk, C. E. Lewis, F. B. Loomis, and Charles R. Bissell:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of Arkansas, wherein Joseph Davis, as Collector of Chicot County, Arkansas, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice shou'd not be done to the parties in that behalf.

Witness, the Honorable Henry C. Caldwell, Judge of the District Court, this the seventh day of March, [SEAL.] A. D. 1884.

HENRY C. CALDWELL, Judge.

We acknowledge service of the above citation, this seventh day of March, 1884.

C. P. REDMOND,
E. W. KIMBALL,
B. C. BROWN,
For Defendants in Error.

Be it remembered that on the eighth day of February, 1884, came into the office of the Clerk of the Circuit Court, of the United States for the Eastern District of Arkansas, Austin Corbin, J. K. O. Sherwood, E. H. Shirk, C. E. Lewis, F. B. Loomis and C. R. Bissell, by B. C. Brown, E. W. Kimball and Charles P. Redmond, Esqs., their attorneys, and filed therein their petition against Joseph Davies, as Collector of Chicot County, Ark., which petition is in the words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF ARKANSAS.

The United States ex rel., Austin Corbin, J. K. O. Sherwood, E. H. Skirk, C. E. Lewis, F. B. Loomis and C. R. Bissell,
v.
Joseph Davies, as Collector of Chicot County.

[1] The relators state and show to this court that by the consideration and judgment of this Honorable Court, they have each recovered at different terms a number of judgments against Chicot County, in the State of Arkansas, amounting in the aggregate to many thousands of dollars, which judgments were all based upon coupons taken from bonds issued by the said County of Chicot, under the provisions of the act of the State of Arkansas, passed and approved July 23, 1868, entitled "An Act to be Entitled an Act to Authorize Counties to Subscribe Stock to Railroads," a list of which judgments with their dates and amounts will be hereto attached should it become necessary or be required.

Relators further show that in the month of June, 1883, several writs of mandamus issued out of this Honorable Court, and under the seal thereof, directed to the County Court of Chicot County, commanding said County [2] Court under the provisions of said act to levy a sufficient tax to pay each and all of said judgments; that after the issue of the said writs of mandamus, by the consent of relators, and by and with the approval and consent of this Honorable Court, it was agreed that if the County Court of Chicot County would levy a tax of ten mills upon the property of said county and collect the same, said tax to be distributed *pro rata* among the judgments so recovered by your orators and others against said County of Chicot in this Honorable Court, that such levy, collection and distribution, would be accepted by relators and the other judgment creditors as a sufficient compliance by said County Court with the commands of the said writs of mandamus.

Relators further show that they are informed and believe that the County Court of Chicot County obeyed the said writs of mandamus in accordance with the agreement before mentioned, and did levy ten mills upon the dollar, upon all the taxable property of said county under [3] the provisions of the act aforesaid, to be applied to the payment *pro rata* of the said judgments.

They further show that they are informed and believe that said tax was by the Clerk of the County Court duly and properly extended upon the tax books, that said tax books with said tax extended thereon was in due form of law and in apt time delivered to Joseph Davies, the Collector of Taxes of said County of Chicot, and it thereupon became his duty under the laws to give obedience to the said writs of mandamus, to collect said tax at the time when all other taxes are collected and to pay the same into

this Honorable Court for distribution upon said judgments.

Relators state that they are informed and believe that the said Joseph Davies, as Collector of said County of Chicot, has refused and does refuse to collect said tax; that he collects and receives other taxes levied by the County
[4] Court at the same time and by the same tax levy from the tax payers of Chicot County, and wholly fails to collect the amount of tax so, as aforesaid, levied by the said County Court for the payment of relators judgments and the other judgments rendered by this court against said County of Chicot.

Relators are informed that the said Davies pretends that he has been prevented and is inhibited and restrained from collecting said tax by a writ of injunction which has issued out of Chicot Circuit Court, restraining and inhibiting him from collecting the same, and that he hath no other excuse whatever for so doing.

Relators, however, are willing that the said Davies may be heard to show cause if any he hath why he should not collect said tax.

And they therefore pray that a rule be made and served upon said Davies as said collector, commanding him at
[5] an early day therein named, to appear before this Honorable Court, and show cause, if any he hath, why a peremptory writ of mandamus should not issue commanding him to collect the tax so levied for payment of relators judgments, and why he should not pay the same into this court for distribution to relators and their co-judgment creditors.

And as in duty bound, etc., B. C. Brown, E. W. Kimball, and C. P. Redmond, *Counsel for Relators.*

UNITED STATES OF AMERICA,
Eastern District of Arkansas,

B. C. Brown being duly sworn, says that he believes the statements in the foregoing relation are true.

B. C. BROWN.

Subscribed and sworn to before me this——day of———

And on February 11, 1884, came into the clerk's
[6] office, the respondent, Joseph Davies, as Collector of Chicot County, by John G. B. Simms, Esq., his attorney, and filed therein his response, which is in the words and figures as follows, to wit:

IN UNITED STATES CIRCUIT COURT,
EASTERN DISTRICT OF ARKANSAS,

Austin Corbin, J. K. O. Sherwood, E. H. Skirk and others,
v.
Joseph Davies, Collector Chicot County Ark.

Comes Joseph Davies, Collector of Chicot County, Arkansas, and for answer to the rule made upon him herein, begs leave to state; that on the twenty-ninth day of January, A. D. 1884, being the last day of the January Term of the Chicot County Court, there was filed in open court, a complaint in equity, by one Alice R. Hamlet, against this respondent as collector as aforesaid, setting up among other facts, that she was the owner of certain
[7] lands in Chicot County, assessed for the year 1883, at $400.00; that no valid assessment had been made of said lands, for various reasons therein set forth, that the Board of Equilization for said county, which met on the nineteenth day of June, 1883, was illegally organized and proceeded in violation of law to alter and change the assessments of real and personal property turned over to it by the clerk of said county; and avowing that said assessments were not legally *equalized*, and that there is no valid assessment of property in said county for the year 1883, and that the taxes levied on said assessments can not be legally enforced, by sale or otherwise, against the objection of the tax payers of said county. Said complaint further sets forth the various amounts or rates of taxes levied by the County Court for different purposes for the year 1883, including ten mills to pay the judgments against said county, rendered in this Honorable Court; that the
[8] tax books had been placed in respondent's hands with a warrant thereto attached in due form, directing the collection thereof; and praying that this respondent and his deputies be restrained and injoined from collecting or attempting to collect said ten mill tax, or any part thereof, from the plaintiff therein, or from any tax payer in said county, and from any of the property of said county, until the further order of said court, and for process against this respondent, etc. A copy of which said complaint is hereto annexed and made part of respondent's answer to the rule herein.

That to avoid costs this respondent entered his appearance to said complaint, saving and reserving to himself the

right to plead to the same at the next term of the Chicot Circuit Court, at which time said cause would stand for final hearing and determination.

That pursuant to the prayer of said complaint, a tem-
[9] porary restraining order was made by the Hon. John M. Bradley, Judge of said court, forbidding respondent from collecting any portion of said ten mill tax—and that pursuant to such order and mandate respondent has thereafter refused to collect said tax.

Respondent further states that no process from this court was ever served upon him requiring the collection of said tax, and that he felt bound by the order of said Chicot Circuit Court to disobey the warrant attached to the tax books turned over to him for the year 1883, commanding him to collect said tax of ten mills.

Wherefore, having fully responded to the rule upon him herein, respondent prays to be dismissed, with his costs, etc.

JOHN G. B. SIMMS,

[10] For respondent, Joseph Davies, Collector, etc.

(Copy of Complaint.)

IN THE CHICOT CIRCUIT COURT.

JANUARY TERM, 1884.

Alice R. Hamlet, Plaintiff, Against Joseph Davies, as Collector of Chicot County, Defendant.	Complaint In Equity.

The plaintiff, Alice R. Hamlet, states that she is the owner of the North-east quarter of section thirty-three, in township eighteen South, in range three West, in Chicot County, valued and assessed for taxation for the year 1883 at $400.00, and other property, real and personal, in said county; and that said property of plaintiff and the property of other tax-payers of said county was not legally assessed for taxation for 1883, as plaintiff is informed and believes; that the assessor of said county failed to give notice that he would meet the tax-payers at the voting places in the several townships, as required by law; that
[11] said assessor failed to meet the tax payers at the voting places in several of the townships of the county as required by law; that said assessor appointed one assistant, but did not assign to such assistant a part or division of the county to assess the property therein, as required by law; that said assessor was not in good health during the time for making the assessment, and wholly failed to attend in some of the townships, to meet the tax-payers, for the

purpose of taking lists of their real and personal property in such townships, and his assistant, alone, met such of them as chose to attend, at such times and places as were most convenient to him; and in other townships the assessor and his assistant both met the tax-payers, at such places as to them were most convenient, without regard to the voting-places in such townships. and received the lists of real and personal property, and the lists of personal property so received were compiled, and the valuation of the real estate was fixed, in most instances, by the assistant, and, in other instances, by the assessor, on the book
[12] or list furnished the assessor by the clerk; that no oath as to the correctness of the assessment and valuation was made by the assistant to the assessments and valuations made by him for the townships where he attended alone, or for the townships where he did part of the work and the assessor did the other part of the work; but the assessor, in disregard of the facts and of the law, returned the list and assessment of real property and the list and assessment of personal property, so taken as aforesaid, into the office of the Clerk of the County Court, with his oath, alone, subscribed and attached to each of said lists; and plaintiff states that she is advised and she respectfully submits to the better judgment of the court, that said assessment of real and personal property for taxation for the year 1883 were not made and returned as required by law, and no valid levy of taxes could be made thereon.

And plaintiff further states that on June 19, 1883, two of the three members of the County Board of Equaliza-
[13] tion met and organized, by electing one of the two present as President, and, with the board so organized, the Clerk laid before it the lists and assessments and valuations of personal property, and of real property, as returned by the assessor, as aforesaid, and said board fixed a minimum valuation for certain kinds of personal property, and directed the clerk to raise all such property assessed below such valuation up to it, and to leave such property as was assessed above such valuation as returned by the assessor, without hearing evidence as to the true value of the property to which the additional valuation was added—that is to say, instead of equalizing as fixed by the terms of the law; and that said board endeavored to equalize the real property upon the idea that the buildings and improvements added to the value of the entire body of the cleared lands of the plantation or farm on which they were situate, instead of to the value of the particular tract

or lot upon which buildings and improvements were
[14] situate, as provided by law, and changes were made in said assessments and lists accordingly; and plaintiff submits that said action by the Board of Equalization was in violation of law and rendered such assessments void, if otherwise legal, and plaintiff is advised and respectfully submits to the better judgment of the court that the said assessment of real property and said assessment of personal property in Chicot County, for taxation, for the year 1883, were not legally *equalized*, and that there is no valid assessment of said property for taxation for the year 1883, and that the taxes levied on said assessments can not be legally enforced against the said property, by sale or otherwise, against the objection of the tax payers of said county.

And plaintiff further states that the County Court of said county levied on said property of the tax-payers in said county, including the property of plaintiff, on the basis and valuation of said illegal assessments and equali-
[15] zation, as taxes for the year 1883, seven mills on the dollar for state purposes, six mills on the dollar for county purposes, and ten mills on the dollar to pay judgments against the county, besides district school taxes in some of the townships; the taxes upon plaintiff's said property being $—— for State purposes, $—— for county purposes, and $—— for district school purposes, and $—— to pay judgments; and that said taxes were extended upon the tax books of said county, and said tax books have been placed in the hands of defendant herein, Joseph Davies, as Collector of Chicot county, together with a warrant thereto attached, commanding him, as such Collector, to collect said taxes; and that while plaintiff recognizes the taxes for State, County and district school purposes as just, and though not legally a lien and burden on her property, she is willing to pay and has paid the same voluntarily, she does not recognize the tax of ten mills as just, and is not willing to pay the same, or any part of it, so long as any legal objection can be interposed to prevent its
[16] collection; that, unless restrained, said collector will proceed to collect said unjust ten mill tax, notwithstanding its illegality, from plaintiff and other tax-payers in said county of Chicot, to their great wrong and injury.

The premises considered, plaintiff, on behalf of herself and other tax-payers of Chicot County, prays for a temporary restraining order, directed to said defendant as such Collector, enjoining and restraining him and his deputies from collecting or attempting to collect said ten mill tax,

or any part thereof, from plaintiff, or from any tax-payer in said county, and from any of the property of said county, until the further order of this court; and that said defendant be summoned to answer this complaint, and that upon the final hearing of this case, that such injunction be made perpetual; and for other relief.

[17] D. H. REYNOLDS,
Attorney for Plaintiff.

STATE OF ARKANSAS, }
COUNTY OF CHICOT. }

John C. Hamlet, the agent for the plaintiff, Alice R. Hamlet, who is now absent from Chicot county, states that he believes the statements in the foregoing complaint are true.

J. C. HAMLET.

Sworn to before me on this, twenty-ninth day of January, 1883.

GEORGE T. WILKINSON, Clerk.

And on said eleventh day of February, 1884, the petitioners filed a demurrer to said response, which is in the words and figures following, to-wit:

Circut Court of the United States, Eastern District of Arkansas.

United States, ex rel. Austin Corbin, J. K. O. Sherwood, E. H. Shirk, C. E. Lewis, F. B. Loomis and C. R. Bissell,
v.
Joseph Davies, as Collector of Chicot County.

[18] And now come the said relators and demur to the response of said Davies, as Collector of Chicot County: Because the said response is evasive and insufficient in law as an answer to the rule issued in this matter, and shows no sufficient cause why the said Davies, as Collector, should not proceed to collect the taxes required by the peremptory mandamus issued in this matter.

EBEN. W. KIMBALL,
CHAS. P. REDMOND,
B. C. BROWN,
For Relators.

On which demurrer was made the following order:

UNITED STATES OF AMERICA,

EASTERN DISTRICT OF ARKANSAS.

Be it remembered that at a Circuit Court of the United States of America, in and for the Eastern District of Arkansas, begun and holden on Monday, the twenty-second day of October, Anno Domini one thousand eight hundred and eighty-three, at the United States Court room, in the City of Little Rock, Arkansas, the Honorable
[19] Henry C. Caldwell, District Judge, presiding and holding said court, the following proceedings were had, to-wit, on February 11, 1884:

U. S. ex rel. Austin Corbin, C. E. Lewis, F. B. Loomis, E. H. Shirk and C. R. Bissell,
2709 v.
Joseph Davies, as Collector of Chicot County.

And now this matter came on to be heard, upon the application of the relators for a peremptory mandamus to Joseph Davies, the Collector of Chicot County, and the response of said Davies, as such Collector to said application; and the demurrer of said relators to said response—said relators appearing by B. C. Brown, E. W. Kimball and Chas. P. Redmond—and said respondent by D. H. Reynolds and J. G. B. Simms; and the court having heard the same and being well advised in the premises, doth consider and adjudge that said demurrer be and the same is hereby sustained, and said response held for naught.
[20] And it is by the court now here ordered and adjudged that said Joseph Davies, Collector of Chicot County, Arkansas, do proceed forthwith to collect, in United States currency only, the taxes levied by the County Court of Chicot County, for the year 1883, (to-wit, one per centum of the assessed value of the taxable property of said county,) in pursuance of the various writs of mandamus issued by this court to said County Court, for the payment of the various judgments theretofore rendered by this court upon the coupons of the bonds of said county, issued in aid of railroads, under the Act of July 23, 1868. And that this he do, the same as if no injunction had been made or issued to him by the Circuit Court of Chicot County, restraining or enjoining the collection of said tax; and that the moneys so collected, without diminution or

costs, except legal commissions, be forthwith paid into the registry of this court. The said collector will collect the said tax as other delinquent taxes are collected, but without penalty upon all such taxes which may be paid before the day when, by law he is required to advertise real estate
[21] for sale for such delinquent tax. It is further ordered that a duly certified copy of this order shall forthwith be served, by the Marshal, on said Collector. To which ruling and order of the Court respondent excepts; and time is given him to prepare and file his bill of exceptions.

Which bill of exceptions is in the following words and figures, as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF ARKANSAS.

U. S. ex rel. Austin Corbin et al.,
vs.
Joseph Davies, Collector of Chicot County. } Bill of Exceptions.

Be it remembered that at the hearing of this case, on February 11, 1884, upon the petition of relators, and response of the collector, and the demurrer to the response, it was agreed and admitted that peremptory writs of mandamus were duly issued from this court, commanding the County Court of Chicot County to levy a tax to pay
[22] judgments which were duly rendered in this court in favor of the relators and others, upon coupons cut from bonds issued by said county, under the provisions of an Act of the General Assembly of the State of Arkansas, approved July 23, 1868, and entitled, "An Act to authorize counties to subscribe stock in railroads," which judgments amount, in the aggregate, to about $105,000.

The following is a copy of one of said writs:

UNITED STATES OF AMERICA,

EASTERN DISTRICT OF ARKANSAS.

In the Circuit Court of the United States for said Eastern District.

United States ex rel., Austin Corbin
v.
Chicot County.

The President of the United States, to the County of Chicot and the County Judge, and..... Justices of the Peace of said county, constituting the County Court of said county, for the purpose of levying taxes:

WHEREAS, It appears of record in our said court
[23] that the said relator herein, upon the 30th day of October, 1879, recovered judgment in our said court, against said county, for the sum of $1,956.25, debt and damage, and $54.35 cost of suit, with six per cent. interest per annum thereon, upon certain coupons cut from bonds issued by said county under provisions of an Act, approved July 23, 1868, entitled An Act to authorize counties to subscribe stock in railroads, which judgment is in full force.

And, whereas, by the provisions of said act, power is given to, and it is made the duty of, said County Court to levy a special tax, annually, sufficient to pay said coupons as they mature (which power and duty is in no manner restricted or impaired by the constitution of the State of 1874). And, whereas, said county has neglected and refused to pay said judgment, and, upon due notice, has failed to show any sufficient cause against the issue of a peremptory writ of mandamus to compel the performance of said duty:

Now, Therefore, We command you and each of you so composing said County Court for the levy of taxes,
[24] to meet and convene on the first day fixed by law, in July, 1883, for levying taxes for county purposes, at the place appointed by law, and then and there levy a special tax on all the taxable property of said county of Chicot, payable in United States currency only, to pay the said judgment, interest and costs, and costs of this proceeding; and that you cause the same to be collected at the same time and in the same manner other taxes are collected, and, when collected, that you cause the same to be paid into the registry of our said court, at Little Rock, without delay; and this levy, collection and payment you will make and cause to be made in addition to all other taxes you are by law authorized and required to levy at the same time. And hereof fail not, and make due return, in writing, to our said Circuit Court, on the first day of its next term, how you have executed this writ.

In testimony whereof, Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United
[L.S.] States has caused the seal of said Circuit
[25] Court to be hereunto affixed, this, third day

of May, 1883, and the one hundred and seventh year of our independence.

Attest: RALPH L. GOODRICH, Clerk.
By W. P. FIELD, D. C.

[NOTE.—The service of this writ on the County Judge, alone, binds the county and the County Court to the performance of the commands of the writ. It is the duty of the County Judge to lay the writ before the County Court, when convened to levy county taxes.]

All others, thirty-eight in number, were of like tenor and effect, except as to names of relator and amount of judgments.

That subsequently and after said writs issued and were served, by permission of this court and by an agreement between the said creditors and the County Judge of said county, it was stipulated that the levy of ten mills on the dollar of the taxable property of said county, amounting to about $1,365,000, which tax would produce about $10,000 over and above delinquencies and expenses of collec-
[26] tion, would be a satisfactory compliance with the demands of said writs for 1883; and it was further agreed that said collection should be distributed *pro rata* among said judgment creditors, towards satisfying said judgments; that no one of said creditors would receive exceeding $900.00 of said collection, and no tax-payer of said county would pay on said levy over $1,500.00; that said tax of ten mills was duly levied, in pursuance of the command of said writs of mandamus, and the tax aforesaid was extended on the tax books of the county, by its clerk, and that said tax books were, in November and December, 1883, placed in the hands of respondent, as Collector; that respondent was engaged in collecting said taxes, and had collected a small part thereof, when, on January 29, 1884, he was, by the Circuit Court of Chicot County, enjoined and restrained from collecting said ten mills tax until the further order of that court; and that said Collector was not restrained by the State Court from collecting any
[27] other taxes levied at the same time with the said tax of ten mills; that, in obedience to said injunction, respondent refrained from collecting said tax of ten mills, and that said injunction suit is still pending and undetermined; that said writs of mandamus, directing the levy of said tax did not, in terms, include the Clerk or the Col-

lector of said county, nor were said writs served on either of them.

These were all the facts in the case not embraced in said petition and response.

And thereupon, after argument of counsel, the court made the following ruling and decision:

1. That this court acquired jurisdiction of the subject-matter of the assessment and of the levy and the collection of taxes in Chicot County for 1883, so far as the same related to the tax directed to be levied by its writs of mandamus, and that the State Court had no jurisdiction to inquire into the assessment, the levy, or the collection
[28] of the tax, so far as same related to or affected the tax ordered by the mandate of this court, or to restrain the collection of such tax.

2. That the irregularities and alleged defects in said assessment, as set out in the exhibit to the response are not sufficient to invalidate the assessment, or to warrant a court in restraining the collection of a tax levied thereon.

3. That the injunction by the State Court is no defense to this application for a mandamus to enforce the collection of said tax of ten mills.

4. That the writ of mandamus, as prayed for, should be granted, and it will be accordingly so done.

To which rulings and decision of the court the respondent, at the time, excepted, and, by leave of court, has reduced the admitted facts, not fully stated in petition and response and the said rulings and decision, to writ-
[29] ing, and here presents same, to be signed and sealed and made a part of the record in this case, which is accordingly done, on this fifteenth day of February, A. D. 1884.

HENRY C. CALDWELL,
U. S. Dist. Judge, Eastern Dist. Arkansas.

[30]

UNITED STATES OF AMERICA,

EASTERN DISSRICT OF ARKANSAS.

I, Ralph L. Goodrich, Clerk of the Circuit Court of the United States, for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct and compared copy of the original, remaining of record in my office, of the bill of exceptions and papers thereto referred in the above entitled cause.

In witness whereof, I have hereunto set my hand and the seal of said court, this, twenty-sixth day of February, in the year of our Lord one thousand eight hundred and eighty-four, and of the independence of the United States of America one hundred and eight.

[SEAL.]

RALPH L. GOODRICH, Clerk.

122-639

OFFICE SUPREME COURT
FILED.
JAMES McKENNEY
CLERK.

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

No .....

JOSEPH DAVIES,
as Collector of Chicot County, Arkansas,
Plaintiff in Error,

vs.

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS and CHAS. R. BISSELL,
Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

A. H.. GARLAND,
~~JOHN G. B. SIMMS,~~
~~D. H. REYNOLDS,~~
For Plaintiff in Error.

LITTLE ROCK, ARK.
MITCHELL & BETTIS, LAW PRINTERS,
1884.

IN THE

Supreme Court of the United States of America.

JOSEPH DAVIES, as Collector of Chicot County, Arkansas, *Plaintiff in Error.*

No.— *vs.*

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS, and CHARLES R. BISSELL, *Defendants in Error.*

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR,

ON MOTION TO DISMISS.

The tax when levieed in obedience to the peremptory writ of mandamus directed to the County Court stood precisely as if it had been voluntarily levied without the command of the writ. The writ neither increased nor abridged the power of the Circuit Court to take subsequent steps in relation to the collection of the tax. The duty of the Collector

was not made plainer by the issuance of the writ, its office being merely to command the County Court to perform a duty. The power of the Circuit Court to issue that writ, the duty of the County Court to obey it and the act of the County Court in obeying, are not here questioned by plaintiff in error.

When the County Court levied the tax it performed its whole duty in relation to the tax, and the writ had performed its office, and had no force or virtue as a basis for proceedings against any officer who might have duties to perform in relation to the tax after its levy and who might fail to perform such duties.

Ex Parte, Rowland, 104, *U. S., p.* 623.

The jurisdiction of the Circuit Court to issue the writ of mandamus to the County Court, or to issue a like writ to any officer, in relation to the collection of the tax, depends not upon the fact that a former writ was issued, but upon the fact that relators have judgments that cannot be enforced in any other manner.

Davenport v. County of Dodge, 105 *U. S.*, 237.

The laws of Arkansas provide for a Tax Assessor to list and value the property subject to taxation, a Board of Equalization to equalize the assessed values, a County Court to levy the taxes on the equalized assessed valuation, a Collector to collect the taxes, and a Treasurer to receive the taxes and pay them out for the purposes for which they were raised. Each officer or board of officers acts independently of the others. The services of all these officers

are required in the assessment, the levy, collection and disbursement of taxes. The peremptory writ of mandamus to the County Court, commanding it to levy the tax *did not*, and in its very nature *could not*, extend to the Collector, whose duties did not begin until the duties of the County Court had ended. The writ must issue directly against him whose duty it is to do the thing the parties seek to have done.

Ex Parte, Rowland, 104, *U. S.*, *p.* 623.

So much in response to what is said by defendants in error in regard to the peremptory writ of mandamus to the County Court, commanding it to levy the tax.

The proceeding against the Collector must rest upon its own merits and is in no way dependant upon the proceeding against the County Court.

It is maintained by defendants in error that the judgment of the Circuit Court in the proceeding against the Collector "is not a *final judgment* from which a writ of error will lie to this Court."

To this it may be sufficient to say that in *Riggs v. Johnson County*, 6 *Wallace*, *p.* 189, this Court in speaking of the power to issue writs of mandamus in this class of cases, stated, that the Circuit Courts may issue such writs "whenever it is necessary, agreeably to the principles and usages of law, to the exercise of their proper jurisdiction, *and their*

judgments in such cases may be re-examined in this Court on writ of error." The numerous cases that have been before this Court on writs of error to the Circuit Courts to re-examine judgments granting or refusing writs of mandamus in like cases, from the case of *Riggs v. Johnson County* to the late case of *U. S. v. Dodge County*, 110 *U. S.*, 156, should be quite sufficient to remove all doubts on the question.

See also Northrop v. Marion Co. v. Meeker 109 U.S. 180.

The second ground set up to sustain the *motion to dismiss* is not more tenable.

From the face of the record it clearly appears that the amount in controversy exceeds five thousand dollars.

The judgments of the relators at whose instance the tax was levied, amount to about one hundred and five thousand dollars.

The amount of tax to be collected under the judgment of the Circuit Court awarding the writ is about ten thousand dollars.

The amount to be paid to relators is the full amount of the tax (say $10,000) to be distributed *pro rata* on their several judgments.

It is insisted by defendants in error that this case falls within the rule in *Russell v. Stansel*, 105 *U. S.*, 221, and that as no one of the tax-payers would have to pay more

than $1,500, they cannot unite to give the Court jurisdiction, though the taxes of all would exceed five thousand dollars.

The answer to this is complete in this—the tax-payers are not parties to this suit or proceeding—they are not parties to the record as in that case. Again, the cases are unlike if we could consider the tax-payers in Chicot as parties, in that case there was a voluntary union of the parties seeking to enjoin the tax, each enjoining for himself, though acting through a committee, and the appeal was from the decree dissolving the injunction. Each tax-payer could have abandoned the injunction suit and paid his taxes and released his property; while in Arkansas the party seeking to enjoin a tax must sue "*in behalf of himself and all others interested*," and the officer is enjoined from receiving the tax from any of the tax-payers. So here the amount in controversy would be the full amount of the tax enjoined.

The defendants in error cite *Chatfield v. Boyle*, 105 *U. S.* 81, to sustain the theory that as the amount to be distributed on each of their judgments does not exceed nine hundred dollars, that such sum is to be regarded as the amount in controversy. The case cited establishes just the contrary. It establishes the rule that the entire fund to be distributed to the parties that are before the Court seeking the distribution is the amount in controversy. In that case there was a fund of $6,354.91, and the debts of the complainants united were but little in excess of one-half of the indebtedness, and their *pro rata* would have been less than

five thousand dollars, Here the relators would receive the whole $10,000 of tax—while no one of the judgments of defendants in error would receive a credit exceeding nine hundred dollars, for some of the parties have more than one judgment. And if each of the six defendants in error should receive only nine hundred dollors, it would make a sum exceeding five thousand dollars.

This Court in *Town of Elgin v. Marshall*, 106 *U. S., p.* 615, held that the sections of the Revised Statutes limiting the jurisdiction, "have reference to the matter which is directly in dispute in the particular case in which the judgment or decree sought to be reviewed has been rendered, and do not permit us, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties." Here the judgment sought to be reviewed directed the plaintiff in error to collect a certain tax which it is agreed would yield about ten thousand dollars. If this rule is applied the amount is sufficient to give this Court jurisdiction.

By no established rule for ascertaining the amount in controversy when applied to the facts disclosed by the record in this case can it be said that the amount in controversy does not exceed five thousand dollars.

See "The Marine" 105 Mo, 773.

A. H. GARLAND,
~~JOHN G. B. SIMMS,~~
~~D. H. REYNOLDS,~~
For Plaintiff in Error.

122-639

122-639

Office Supreme Court U. S.
FILED.
FEB 26 1885
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

JOSEPH DAVIES, Collector, &c.,
vs.
AUSTIN CORBIN *et al.*
} No. 828. 7266

Brief for Plaintiff in Error against the Motion to Dismiss or Affirm—and Motion of Plaintiff to supply the Record.

This case has no little trouble in keeping itself in this court, for this is twice it has been attacked by a motion to dismiss. The first venture was a motion to dismiss only, and now this move is to dismiss or affirm, "as the case may be." The court will observe these efforts are made upon exactly the same record. Nothing has been added to or taken from the record since the first onslaught was made, nearly one year since, to drive the case from this court. How many times a party shall be allowed to renew such assaults, the rules of the court do not say; but for the protection of the court, in its onerous work at best, certainly it should not be permitted oftener than once a year.

The court, in disposing of the first experiment in this direction, on the question of jurisdiction, based on the amount involved, remarked truly that a motion to affirm might, under the rule, very properly have been united with a motion to dismiss. And with the change of counsel for defendants, this seems to be construed into an invitation to make another motion to dismiss and unite with

it the motion to affirm. The court certainly could not have meant this, nor could it have intended to intimate, in the slightest degree, that a motion to affirm would have been successful. The present counsel, in his brief for the motion to dismiss, rather admits that this is pressing matters, for in the conclusion it is remarked, "the counsel employed at the time [when first motion was made] were not aware of the defects in the record upon which the present motion is founded." The court will not fail to observe that the counsel who made the first motion sent this record here just as it is, and accompanied it with the motion to dismiss, and it is not probable that they did not know all that the record contained, since the whole of it is not sixteen pages of printed matter. This case, from its present number on the docket, may not be reached for two years yet, and at each term, till it is disposed of on its merits, let the counsel be changed and new supposed errors or defects in the record be disclosed, and annually, if not oftener, the court will be asked to dismiss or affirm, or do something else with the case besides passing on its merits.

Then, what is the trouble?

1. There is no bond, as required by the statute. This is a mistake. There was a bond given and approved, but the first counsel for defendants, trusting alone to the question of jurisdiction for dismissal, did not send a copy of the bond with the transcript. A certified copy of the bond is herewith presented, and the court is asked to permit it to be filed and the record to this extent supplied.

Even in the entire absence of a bond, the law presumes the judge who signed the citation complied with the statute; but if he did not, and the defendants are thereby *prejudiced*, this court will now permit the bond to be given.

Spear on Fed. Jud'y, p. 560.
Martin v. *Hunter's Lessee*, 1 Wheat., 304.
Davidson v. *Lanier*, 4 Wall., 447.
Seymour v. *Freer*, 5 Wall., 822.

2. The record does not contain any assignment of errors.

There is no rule or decision of this court, prescribing exactly how and in what words an assignment of errors shall be made, nor is it required even to use the word *assign*. If from the record it appears error is asserted, claimed, declared, suggested, or noted, so the court can possess itself of the matter to be tried, that is quite sufficient. If the court will examine page 15 of the record it will see the court below made four certain "*rulings and decisions*," and to all of them Davies excepted, and had his exception noted of record, and the court signed the same, &c. And now, when the case is reached on the docket for hearing on the merits, counsel for plaintiff will *assign* these very points for error in his brief, in compliance with Rule 21 of the court. It may well be doubted whether in the long list of cases that have appeared in this court, and disappeared from it, errors in any of them were more distinctly set forth and indicated than they are in this.

But the real point in this is an ingenious effort to get the court to pass on the merits of this case, in advance of its time on the docket. This is, in other words, a short cut to the questions actually involved in this record. Let a party have the right on a motion to dismiss, to assert, anyhow, "*the questions are so frivolous as not to need further argument*," and this court will soon have little else to do but to hear motions *to dismiss or affirm*. Some pretext will be discovered in every case for questioning the jurisdiction, followed with the assertion, *be this as it may, this appeal is for delay, and the questions are frivolous*, &c. This may be expeditious, but it is not good, sound judicial practice. If upon the hearing the court is satisfied this writ of error is prosecuted for delay, possibly ample reparation can be awarded the creditors under Rule 23 of the court. The court cannot, in this preliminary and some-

what summary way, say that the important and close questions saved (Record, p. 15) are frivolous—questions touching the jurisdiction of two tribunals, and the regularity of assessments. It is much better for the court to say, as is its custom, these questions will be heard and considered when the case is reached on its merits.

Texas, &c., v. *Kirk*, 111 U. S., 486; *Ib.*, 488.

And the labor will be quite sufficient when that time comes, without anticipating it. It is submitted it is not the kindest treatment to the court, under the pretense there is no jurisdiction here, to say, at last, the contention is so *frivolous as not to need further argument*, to proceed then and argue it elaborately, by citing and quoting from some half dozen of the leading cases of this court, and then invite the court to examine these cases and compare them with this case, and affirm. The very argument of the defendants refutes utterly the claim that the questions are frivolous. It requires something more than a mere statement of them to show they are wanting in merit or bordering on the frivolous. And by the time the court stepped back to *Knox Co.* v. *Aspinwall*, 24 *How.*, 376, and examined it closely, and retraced its path through the numerous cases from that to *Fairbanks* v. *Hawly*, 108 U. S., 543, and marked and noted the shades of difference in the adjudications upon these matters, running through twenty-four years, and applied them to this controversy, as it will be asked to do, on the merits, it will be convinced this case does not fall within the rule asserted here, and a good deal of argument is needed to determine it; and the half dozen cases cited by defendants on pp. 5 and 6 of their brief by no means exhaust the questions in dispute. Hence the wisdom of the practice of this court, in postponing these questions till the case is called for argument on the merits.

A. H. GARLAND,
For Plaintiff in Error.

The above was scarcely sent to press before another effort of the same character is made in *Gaines et al.* v. *Corbin et al.*, on writ of error to the same court, with parties the same, except plaintiff in error, and the questions in the original cases the same. And this is evidently moved and instigated by the remark of this court in *Davies* v. *Corbin*, as to moving at the same time to dismiss or affirm. Counsel in the court below having just found that remark, seem to think they had struck a bonanza, and, to hurry up an affirmance of this case, they bring before the court a bundle of objections so glaringly technical that they themselves are forced to confess it, in a postscript to their brief, but plead as an excuse the frivolous grounds of the case on its merits. It was not necessary to admit these objections to the jurisdiction are technical; the mere reading of them reveals the very quintessence of technicality. Most of them are settled in the *Davies Case*, and all of them combined do not amount to even one fair and reasonable point for discussion. They are too microscopic and fine-spun for argument. But they do serve to illustrate and make good what was said above, that this practice of raising questions as to jurisdiction merely to get at the merits, before a final hearing of the case, when called regularly on the docket, would become general if not discouraged and put down. It is now fast becoming a malady here of an epidemic character, and now, and in these cases, would be a fit place and time to arrest it and prevent its spread.

The attempt to bring into service here, for the benefit of defendants, the decisions in *Labette County* v. *The United States*, 112 U. S., 217, *and Wilson's Case*, 109 U. S., 621, is futile, as here the officers upon whom the writs of mandamus operated were charged, under the law, with the

specific duty sought to be enforced by these writs, which was not the state of the case in the two decisions referred to. Davies and Gaines had to collect these taxes, and no one else, and they were the proper parties in the cases below, and the only ones who could appeal, and they are seeking to protect themselves between two jurisdictions, practicing a duel over them. As each officer would be liable to mandamus for the performance of the special duty assigned him under the law, so he would be entitled to his appeal or writ of error in the case brought against him to compel the performance of this duty; and that is all there is of it.

A. H. GARLAND,
For Gaines et al.

122-639

Office Supreme Court U. S.
FILED.

Supreme Court of the United States of America.

No......

JOSEPH DAVIES,
as Collector of Chicot County, Arkansas,
Plaintiff in Error,

vs.

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS and CHAS. R. BISSELL,
Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DEFENDANTS IN ERROR.

B. C. BROWN,
E. W. KIMBALL,
C. P. REDMOND,
For Defendants in Error.

LITTLE ROCK:
UNION PRINTING COMPANY, LAW PRINTERS.
1884.

In the Supreme Court of the United States

OF AMERICA.

MOTION TO DISMISS.

JOSEPH DAVIES, as Collector of Chicot County, Arkansas, *Plaintiff in Error*,

No.— v.

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS, and CHARLES R. BISSELL, *Defendants in Error.*

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

And now come the defendants in error and relators in the court below, Austin Corbin, J. K. O. Sherwood, E. H. Shirk, C. E. Lewis, F. B. Loomis, and Charles R. Bissell, and move the court to dismiss this cause and the writ of error issued herein to the Circuit Court of the United States for

the Eastern District of Arkansas, on the seventh day of March, 1884:

First—Because the said writ of error is sued out upon an order of said Circuit Court for the enforcement of its peremptory writ of mandamus, theretofore duly and regularly issued in accordance with law and the practice of said court, which order is not a *final judgment* of said Circuit Court, and is, therefore, not such a judgment, order or proceeding as can legally be brought to this court by writ of error, and is not within the jurisdiction of this court.

Second—And because the amount in controversy does not exceed the sum of five thousand dollars, wherefore the same is not within the jurisdiction of this court.

B. C. BROWN,
E. W. KIMBALL,
C. P. REDMOND,
For Defendants in Error.

In the Supreme Court of the United States

OF AMERICA.

NOTICE.

JOSEPH DAVIES, as Collector of Chicot County, Arkansas, *Plaintiff in Error*,

No.— v.

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS, and CHARLES R. BISSELL, *Defendants in Error.*

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

To Joseph Davies, as Collector of Chicot County, Arkansas, and to D. H. Reynolds and J. G. B. Sims, Esqs., Attorneys for said Davies as Collector:

SIR AND GENTLEMEN—You will please take notice, and you are hereby notified—

That the defendants in error in the above entitled matter will, on Monday, the 14th day of April, 1884, move the Supreme Court of the United States to dismiss the writ of error sued out by you to the Circuit Court of the United States for the Eastern District of Arkansas, in the above entitled cause, for the reason that no writ of error lies in such case; and the said Supreme Court of the United States has no jurisdiction to entertain such writ,

Because of the matters assigned in the motion to dismiss, and the brief for defendants in error herewith served upon you, to-wit:

That the order of the court, alleged, as error, is not a final judgment of said Circuit Court.

That the amount in controversy in said matter is less than five thousand dollars.

B. C. BROWN,
E. W. KIMBALL,
C. P. REDMOND,
For Defendants in Error.

In the Supreme Court of the United States

OF AMERICA.

JOSEPH DAVIES, as Collector of Chicot County, Arkansas, *Plaintiff in Error*,

No.— v.

AUSTIN CORBIN, J. K. O. SHERWOOD, E. H. SHIRK, C. E. LEWIS, F. B. LOOMIS, and CHARLES R. BISSELL, *Defendants in Error.*

Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DEFENDANT IN ERROR,
ON MOTION TO DISMISS.

STATEMENT OF CASE.

The defendants in error, at various times, obtained various and several judgments against the County of Chicot,

State of Arkansas, upon coupons cut from bonds issued by said county, in 1872, for stock subscribed to certain railroads, under the provisions of an act of the General Assembly of the State of Arkansas, approved July 23, 1868, entitled, "An Act to authorize counties to subscribe stock in railroads."

On the ——— day of June, 1883, peremptory writs of mandamus were duly and regularly issued in each case to the County Court of said county, requiring said County Court to levy and collect a tax upon the taxable property in said county for the year 1883, to pay said judgments—said tax, when collected, to be paid into the registry of said Circuit Court.

Said peremptory writs of mandamus were duly served upon the County Court of said county, which County Court obeyed said writs, and levied a tax of one per centum upon the property of said county, which levy of one per centum was not sufficient to pay said judgments, but which was, by convention between the said County Court and defendants in error, considered as a satisfactory levy for the year 1883—which tax of one per centum was duly extended on the tax books of said county for the year 1883, by the County Clerk.

Said tax books were placed in the hands of plaintiff in error, the County Collector, for collection.

Whereupon said collector commenced to collect said taxes—

When—One Mrs. Alice R. Hamlet filed her bill in the Circuit Court of Chicot County, State of Arkansas, setting

up irregularities in the equalization of said taxes by the County Board of Equalization; and prayed for and obtained an injunction on the collector and plaintiff in error, restraining him from collecting said one per cent. tax, but not restraining him from collection of the other taxes, State and County, on said tax books.

Whereupon said collector refrained and desisted from collecting the said one per cent. tax, but continued to collect and did collect the other taxes (State, County and School) on the said tax books.

Whereupon, the relators and defendants in error, upon petition filed, obtained from the Circuit Court of the United States for the Eastern District of Arkansas, a rule upon said Collector to show cause why he should not proceed to collect said one per cent. tax, in accordance with the mandamus of said United States Circuit Court.

To which rule said collector and respondent made answer and response, that he was restrained from collecting said tax by the injunction of said State Court.

To which response of said collector the relators and defendants in error interposed a general demurrer.

Whereupon, the matters arising on said demurrer were heard, argued and submitted to the court. And the court thereupon sustained said demurrer, and ordered said collector to proceed and collect said one per cent tax—

To which order of the court said Collector and plaintiff in error excepted, and sued out the writ of error herein.

GROUNDS OF MOTION TO DISMISS.

FIRST—The order of the Circuit Court requiring the Collector to proceed with the collection of said tax is not a "*final judgment*," from which a writ of error will lie to this court—

The same being a simple order for the enforcement of the process of said Circuit Court.

SECOND—That the amount in controversy in this matter is less than five thousand dollars, and, therefore not within the jurisdiction of this court—

No one of the defendants in error being entitled to receive of the tax collected so much as five thousand dollars—

And no one of the tax payers of said county paying five thousand dollars.

And the amount of tax payable by the complainant in injunction suit in the State Court being less than one hundred dollars.

FIRST.

Upon the question of what is a final judgment to which a writ of error lies, Mr. Phillips, in his Practice, page 82, chap. VIII, says:

"But little difficulty has arisen as to what is a final judgment. From the nature of the proceedings in a Common Law Court, the character of its judgment is easily ascertained. It may be sufficient, therefore, to say, generally, that motions for new trials, orders for process, or execution to carry into effect the judgment, and all other matters which lie within the discretionary powers of the court be-

fore which the case is tried, are not within the revisory power of the Supreme Court, as defined by statute.

The cases are numerous in which the attempt to invoke the appellate power in such matters has been defeated, and the following may suffice to show the course of decision:

Boyle v. Zacharie, 6 Pet., 648.

Picket v. Legerwood, 7 Pet., 144.

Evans v. Gee, 14 Pet., 1.

Ames v. Smith, 16 Pet., 303.

Brocket v. Brocket, 2 How., 238.

Wylie v. Cox., 14 How., 1.

Connor v. Pugh, 18 How., 394.

Doswell v. DeLanza, 20 How., 29.

McCargo v. Chapman, 20 Howard, 555.

Callan v. May, 2 Black, 543.

Gregg v. Forsyth, 2 Wall., 56.

Sparrow v. Strong, 3 Wall., 103.

Barton v. Forsyth, 5 Wall., 190.

Cooke v. Burnley, 11 Wall., 659, 672."

It will be remembered that in this cause the peremptory writs of mandamus to levy the tax to pay the judgments of relators had been duly and regularly issued, and no exception to the issue of those writs had been taken. That the plaintiff in error herein had refused to collect the tax mentioned in the peremptory writs of mandamus, because of an injunction from a State Court. That when a rule

was taken against him to show cause why he should not proceed with the collection of the tax, he responded by setting up the injunction in the State Court, which response was held insufficient. Whereupon the court ordered him to proceed and collect the tax. From this order the writ of error is taken. It is contended that this order of the court is merely an interlocutory order, to carry into effect its judgments against the county and enforce their execution.

The writs of mandamus for the levy and collection of the tax, are in the nature of, and in effect, executions, or processes of the court for the enforcement of its judgments.

The property of counties in the State of Arkansas not being subject to execution, the only course for the collection of a judgment against a county is by process of mandamus, requiring the levy of a tax to pay the judgment.

The mandamus and proceedings thereon are, therefore, nothing more than an execution.

In Riggs v. Johnson County, 6 Wall., 198, this court says:

"Where such exigency arises, they may issue it, but when so employed it is neither a prerogative writ nor a new suit, in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution, to enforce the payment of the same, as provided by the contract."

If, then, the peremptory mandamus is merely the execu-

tion issued on the judgment, the order of the court for the enforcement and carrying into effect that execution is clearly an interlocutory order, and not a *final judgment* from which a writ of error will lie.

In McCargo v. Chapman, 20 How., 555, the syllabus is:

"An order of the Circuit Court to quash an execution is not such a judgment as can be reviewed in this court by a writ of error."

The order complained of in this cause, for the Collector to proceed and collect the tax, is analogous to the attachment issued by the Circuit Court to compel a party to execute a conveyance of land, in case of McMicken v. Perin, 20 How., 133, where it was held, page 135:

"This involved no new question or decision, but was the ordinary means of enforcing the original decree. In no sense was this a final decree on which an appeal could be sustained. It is, in effect, the same as ordering an execution on a judgment at law, which had been affirmed on error, and remanded for execution to the Circuit Court. It has been held that an order of sale in execution of an original decree is not a final decree on which an appeal will lie."

In Callan v. May, 2 Black, 542, which was an appeal from an order awarding a writ of "*habere facias possessionem*," the Chief Justice says:

"This appeal must be dismissed. The application of May for process to obtain possession of the land was not a suit in which any final decree could be passed so as to give

to either party the right to appeal. * * * * The order of the court directing process to issue is not such a final order or decree in a case as the act of 1789 contemplates. It is nothing more than an order of process to carry into execution a final decree already passed in a case in which May was not a party"

So in the case at bar the order on the collector to proceed and collect the tax, is nothing more than an order of process to carry into execution the final judgment previously rendered against the county, which is not, and was not complained of or objected to.

In Barton v. Forsyth, 5 Wall, 190. The syllabus is,

"A judgment on a motion made by the plaintiff to set aside a writ of restitution which had been issued in favor of the defendant, and to grant a writ of restitution to the plaintiff in a case, is not a final judgment within the terms of the said section; in fact is but an order of court. Hence no jurisdiction exists of a writ of error based on such a proceeding."

In that case page 192 the court says: "Exceptions were taken by the defendant to the order of the court setting aside the first writ of restitution and awarding the second to the plaintiff. Based on those exceptions the defendant sued out this writ of error, in which it is alleged in substance and effect that a manifest error has happened in the rendition of a certain judgment on a certain motion, and the proceedings under it, made by the plaintiff to set aside a certain writ of restitution which had been issued out of said court in favor of the defendant, and to grant a writ of

restitution to the plaintiff in a case between these parties."

"Evidently the writ of error is addressed not to the judgment in the cause, but to the order of the court in setting aside the first writ of restitution and in granting the second as specified in the bill of exceptions."

So in the present case—there is no cause in the Circuit Court entitled as this writ of error is. The writ of error here is addressed not to the judgments obtained by the defendants in error against the County of Chicot—not to the allowance and issue of the peremptory mandamus requiring the county to levy a tax to pay those judgments—but it is addressed to a simple order of the court requiring the collector to proceed and collect said tax in obedience to the previous order of the court.

It is not a writ of error to a *final judgment*, but to a mere order for process.

In the case of Smith v. Trabue's Heirs, 9 Peters 7.

After a rule to show cause was granted and returned a writ of restitution was awarded. The court says: "To this judgment of restitution this writ of error is awarded. * * * This is not a final judgment in a civil action nor a decree in a court of equity. It is no more than the action of a court on its own process, which is submitted to its own discretion. This court takes no jurisdiction in such a case. It is not, we think, given by the Judicial Act."

So here a rule on the collector was issued and return made, and an order of the court entered thereon for the enforcement of its process previously issued, this is no

more than the action of the court on its own process, which is submitted to its own discretion, and is in no sense a final judgment.

In Amiss v. Smith, 16 Peters 303, we extract from the syllabus

"Whatever defects may exist in final process error does not lie."

"A refusal to quash final process is not a judgment, much less a final judgment, and error does not lie."

The entry of the order in this case for the collector to proceed and collect the tax mentioned in the rule on him is simply an order refusing to quash the final process of the court theretofore made, i. e. the mandamus to collect the tax—and is not a final judgment.

In Evans v. Gee, 14 Peters 1. The court say—

"It is the settled doctrine here, that a writ of error does not lie upon the refusal of a motion to quash an execution; such record of refusal not being a final judgment in the sense of the twenty-second section of the Judiciary Act."

In the above cause, the case of

Boyle v. Zacharie, 6 Peters 648, to the same effect is affirmed.

It is not deemed necessary to discuss or cite authority, as to whether the injunction issued by the State Court to the collector was any sufficient answer to the rule served on him in this cause—

FIRST.—Because that question has been determined by the

Circuit Court—and will not be examined upon a motion to dismiss.

SECOND.—Because the law is too well settled that State Courts by injunction or otherwise can not interfere with the execution of the process of the courts of the United States—

Ab inconvenienti—

These proceedings arise upon a frivolous attempt by aid of the State Courts to interfere with the final process of the United States Circuit Court to enforce the payment of a judgment against a county.

It certainly is the policy of the law "ut sit finis litium," but if after the merits of a controversy have been fully litigated and discussed—and the court has passed its final judgment on the rights of the parties, it is still open to them, to litigate and delay the process of the court by writs of error or appeals upon the orders of the court to carry into effect its judgment, upon all manner of frivolous pretexts—then legal proceedings are like the labors of Sysiphus, they roll the stone up the hill only for it to rebound, and require to be again uprolled with similar labor and an ineffectual result.

It has been said "Executio est finis et fructus legis" but if every step of the final process of the courts is to be hampered and delayed by endless appeals to higher courts, then a judgment and execution, instead of being the end and fruit of litigation, is but the beginning of new litigation—and the suitor is like Tantalus of old, the water ever at his lips, but receeding whenever he stoops to drink.

If a writ of error can be sustained in such matter as this the creditor of a county or in fact any other creditor may well despair of any relief through the medium of the courts.

Here the county had its day in court—(this proceeding is by the county however it may be disguised in the name of an individual tax payer)—previous to the rendition of the judgments—but no satisfactory defence was made. And again upon the rule to show cause why the peremptory writ of mandamus should not issue to levy the tax, it had its day in court. And now after two solemn adjudications of the court against it—it seeks in this indirect way to deprive its credttors of their rights.

SECOND.

The amount in controversy, is not sufficient to give this court jurisdiction.

R. S. of U. S., as amended by the acts of Feb. 16th, 1875.

Each of the defendants in error has a separate and independent judgment against Chicot County, and no one of them will receive a sum exceeding $900.00 from the collection demanded.

No tax payer in Chicot County will pay, on this levy, more than $1500.00.

If not the amount which each tax payer has to pay, on this levy, then the amount which each creditor, separately, will receive, from this levy, so far as value is concerned, fixes the jurisdiction of this court.

Clifton v. Sheldon, 24 How. 481.

Rich v. Lambert, 12 How. 347.

Oliver v. Alexander, 6 Peters 143.

Stratton v. Jarvis, 8 Peters 4.

Seaver v. Bigelows, 5 Wall. 298.

Paving Co. v. Mulford, 100 U. S. 147.

Terry v. Hatch, 93 U. S. 44.

Chatfield v. Boyle, 105 U. S. 231.

Russell v. Stansell, 105 U. S. 303.

Parker v. Morrill, 106 U. S 1.

B C. BROWN,
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For Defendants in Error.

127-639

MAR 2 1885

IN THE

SUPREME COURT OF THE UNITED STATES.

JOSEPH DAVIES, *Collector of Chicot County*,

vs.

AUSTIN CORBIN, *et al.*

No. 828.

Motion to Dismiss or Affirm.

W. HALLETT PHILLIPS,
For Defendants in Error.

R. O. Polkinhorn & Son, Printers, Washington, D. C.

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Motion to Dismiss or Affirm.

The court is moved to dismiss the writ of error in the above named case for want of jurisdiction, or to affirm the judgment, it being manifest that even if the Court possesses jurisdiction, the writ of error was taken for delay only, and that the question on which the jurisdiction depends, is so frivolous as not to need further argument.

W. HALLETT PHILLIPS,
For Defendants in Error.

Grounds of Motion.

The defendants in error recovered at different times judgments in the Circuit Court of the United States for the Eastern District of Arkansas, against Chicot County in that State on coupons taken from bonds issued by the county.

In June, 1883, writs of mandamus were issued by the Circuit Court, directed to the county court for Chicot County, commanding such court to levy a tax sufficient to pay the judgments. It was agreed that if the county court would levy a tax of ten mills upon the property within the county and collect the same, the tax to be distributed *pro rata* upon the judgments, such levy would be accepted by the judgment creditors, as a sufficient compliance with the commands of the writs.

The levy was made by the county court and the tax extended upon the tax books which were delivered to Joseph Davies, the collector of taxes, whose duty it was to collect the tax at the time when all other taxes were collected.

Davis refused to collect the tax of ten mills. although he proceeded to collect all other taxes, alleging as a reason for his refusal that he had been enjoined from collecting that particular tax by the Chicot County Circuit Court.

Thereupon the judgment creditors united in an application to the United States Circuit Court for a rule upon Davies to show cause, why a peremptory writ of mandamus should not issue, commanding

him to collect the tax levied for the payment of the judgments.

The only cause shown by Davies was the injunction issued by the State Court. This return was demurred to, the demurrer sustained, and a peremptory writ of mandamus ordered.

Thereupon Davis sued out the present writ of error. The record contains a citation *but no bond.*

The present motion to dismiss is rested (1) on the absence of such bond.

A bond is requisite in order to perfect the writ of error. The law requires the judge, on signing the citation, to take sufficient security that the plaintiff in error shall prosecute his writ to effect.

Sec. 1,000, R. S.

It is true that in several cases, where the bond was not to operate a supersedeas, the court has refused to dismiss the writ of error absolutely, but has allowed time to execute it.

But where the omission to execute the bond arises *from negligence*, there would seem to be no ground for sustaining the writ of error.

In *Brobst* vs. *Brobst*, 2 Wall., 97, where time was given, the court say :

> "The omission to file the bond, under the circumstances, may be corrected by filing one in conformity with the act of Congress. The peculiar state of the record, and the mode of bringing up the questions from the court below probably mislead the solicitors."

So in *Seymour* vs. *Freer*, 5 Wall., 823:

> "If, through *mistake* or *accident*, no bond, or a defective bond had been filed, this court would not dismiss the appeal except on a failure to comply with an order to give the necessary security."

That a bond is necessary to perfect an appeal or writ of error is expressly ruled in *Sage* vs. *Railroad Company*, 96 U. S., 712, and in *National Bank* vs. *Omaha*, same Vol., p. 737.

In the latter case the appeal was dismissed.

(2.) The record does not contain any assignment of error as required by Sec. 997, R. S. "There shall be annexed to and returned with any writ of error an authenticated transcript of the record, *an assignment of errors*, and a prayer for reversal, with a citation to the adverse party."

We are aware that it was formerly the practice to disregard this requirement of the statute, and to regard the assignment of error made in the brief as sufficient.

But now, by Rule 8, Sec. 1, there must be transmitted with the record, an assignment of errors. This rule was amended *January* 1, 1884, previous to the suing out of the writ of error in the present case.

We understand that the object of the amendment to the rule, was, in the future, to compel parties to make such an assignment of error as is prescribed by the statute.

(3) Davis, the collector, is not entitled to prosecute this writ of error. The mandamus to the county court constituted the judgment; the orders on the rules to show cause against the tax collector, clerk and other officers, were merely in *enforcement* of that judgment. The levy and collection of a tax is not only an entire thing, although accomplished by successive steps and by separate officials, but is a continuous transaction. *Labute Co.* vs. *Moulton*, 112 U. S., 225. Surely every one of the officials of the State who may have any action to take in the assessment, collection and payment of the tax, cannot prosecute a separate writ of error and make a separate "case" here, every time there is a levy attempted to be enforced under the writs of mandamus. There has already been brought another writ of error to this court by the collector and clerk of the county to prevent the collection of the tax for 1884.

But if the writ of error is not dismissed, it is plain that it was sued out for delay only, and that the only question presented is so frivolous as not to need further argument. The judgment should be affirmed. (*Micas* vs. *Williams*, 104 U. S., 556.)

A stronger case for affirmance under the rule could not be presented to the Court.

The writ of error is brought in the face of the repeated decisions of this Court that it is no answer to a writ of mandamus from the Circuit Court of the United States, in the exercise of its admitted jurisdiction, to set up an injunction issued by a State court.

This doctrine was first announced in *Riggs* vs. *Johnson County*, 6 Wall., 196, and *U. S.* vs. *Keokuk*, Id., 514, and has been since frequently reaffirmed.

Thus, in *Mayor* vs. *Lord*, the Court say: "It is not competent for a State tribunal, thus to paralyze the process issued from a Court of the United States, to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the National Courts, and has therefore been applied by this tribunal upon the fullest consideration, in other cases presenting the same question."

9 Wall., 414.

And again in *Supervisors* vs. *Durant*:

> "It is insisted that even if the Circuit Court may award a mandamus to aid in the enforcement of its judgments, the writ should not have

been awarded in this case, because the District Court of Washington County had enjoined the defendants against levying and collecting any tax for the payment of the bonds and coupons, for a portion of which the relator had obtained his judgment. This injunction the defendants pleaded, and to the plea the relator demurred. That such an injunction was wholly inoperative to prevent the Circuit Court of the United States from enforcing its judgment by a mandamus to the defendants, to compel them to levy the tax which the law authorized and required, is no longer to be doubted. Its invalidity to work such an effect has been *placed beyond question* by the rulings of this Court."

9 Wall., 418.

"If," repeat the Court in *Amey* vs. *Supervisors*, "the ground assumed by the State Court can be maintained, the Constitution of the United States, and the laws made in pursuance thereof, as regards their judicial administration, instead of being the supreme law of the land, would be subordinated to the authority of the courts of every State in the Union. If this writ may be paralyzed by the injunction relied upon, a writ of fieri facias, o ra writ of levari facias may be defeated in the same way. Every judgment of a court of the United States may thus be rendered fruitless of any beneficial result. These views are conclusively maintained by *Riggs* vs. *Johnson*, and the principle involved has since been reaffirmed in the cases which followed, and were controlled by that judgment."

11 Wall., 138.

We submit that the record presents no question which should cause the Court to keep the case on the docket until regularly reached for argument, and thus entail on the bondholders further delay in the collection of the tax levied to pay their judgments.

It is proper to add that there was a motion to dismiss, made at this term, on the ground of want of jurisdictional sum. That motion was overruled, the Court remarking that "a motion to affirm, as allowed by Sec. 5, Rule 6, has not been united, as it very properly might have been, with this motion to dismiss." The counsel employed at the time were not aware of the defects in the record upon which the present motion is founded.

Respectfully submitted,

W. HALLETT PHILLIPS,

For Defendants in Error.